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No. 85-2164

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

WALTER D. AMES and MARION L. AMES,
Petitioners,

v.

STANDARD OIL COMPANY (INDIANA),
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT STANDARD OIL COMPANY (INDIANA) IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether this Court should review a dismissal for failure to prosecute and "blatant disregard of court orders and rules," summarily affirmed by the Court of Appeals, particularly when petitioners directly defy the rules of this Court by failing both to inform the Court of the grounds for dismissal or to append a reported decision setting forth the reasons for dismissal.

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CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. Federal Rule of Civil Procedure 41(b), "Involuntary Dismissal: Effect Thereof," provides in relevant part:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

2. Local Court Rule 1-14 of the United States District Court for the District of Columbia, "Dismissal for Failure to Prosecute" (identical to its successor, Rule 211, effective April 1, 1986), provides:

> A dismissal for failure to prosecute may be ordered by the court upon motion by an adverse party, or upon the Court's own motion. An order dismissing a claim for failure to prosecute shall specify that the dismissal is without prejudice, unless the court determines that the delay in prosecution of the claim has resulted in prejudice to an opposing party.

3. Rule 21 of the Rules of the Supreme Court of the United States, "The petition for certiorari," provides in relevant part:

> .1. The petition for writ of certiorari shall contain, in the order here indicated:
>
> . . .
>
> (d) A reference to the official and unofficial reports of any opinions delivered in the courts or administrative agency below.
>
> . . .
>
> (k) An appendix containing, in the following order:

(i) Copies of any opinions, orders, findings of fact, and conclusions of law, whether written or oral (if recorded and transcribed), delivered upon the rendering of the judgment or decree by the court whose decision is sought to be reviewed.

(ii) Copies of any other such opinions, orders, findings of fact, and conclusions of law rendered by courts or administrative agencies in the case, and if reference thereto is necessary to ascertain the grounds of the judgment or decree, of those in companion cases. Each of these documents shall include the caption showing the name of the issuing court or agency and the title and number of the case, and the date of its entry.

. . .

.5. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and accurate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

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BRIEF FOR THE RESPONDENT STANDARD OIL COMPANY (INDIANA) IN OPPOSITION

INTRODUCTION

Although the Court would not know it from reading their Petition for a Writ of Certiorari, petitioners' complaint was dismissed by the District Court due to petitioners' failure to prosecute and for "blatant disregard of court orders and rules." *Ames* v. *Standard Oil Co. (Indiana)*, 2 Fed. R. Serv. 3d 528, 531 (D.D.C. 1985). The District Court's comprehensive Memorandum Opinion details the conduct which the Court of Appeals agreed made it "abundantly evident" that such dismissal was warranted. Yet, in an action which demonstrates why dismissal was appropriate, petitioners violated the rules of this Court not only by omitting this Memorandum

Opinion from their petition but also by concealing that the dismissal below was for failure to prosecute.[1]

Petitioner Walter Ames, proceeding *pro se*, has been a member of the Bar for more than 30 years and is a partner in an established Washington, D.C. law firm.[2] His conduct therefore is particularly inexcusable and itself constitutes "a sufficient reason" to deny the petition. *See* Supreme Court Rule 21.5. In addition, it indeed is "abundantly evident," as the Court of Appeals found (Opp. at A13), that the District Court's dismissal was appropriate and thus does not raise a legal issue worthy of consideration by this Court. Two courts have found that the dismissal was merited, and there is no reason for the Court to review those findings of fact, particularly in view of a trial court's broad discretion under Fed. R. Civ. P. 41(b) to dismiss an action.

Moreover, petitioners' transparent effort to have this Court review prior interlocutory orders—and not the final order dismissing the case—is flatly contrary to undisputed legal principles. Review of prior interlocutory orders upon dismissal for failure to prosecute would turn the *sanction* of dismissal into a *certification* for appeal of those interlocutory rulings. Finally, these interlocutory orders constituted wise exercises of discretion in

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[1] Petitioners discuss the District Court's July 1984 interlocutory order for three pages in their Petition for a Writ of Certiorari ["Pet."] and then simply state that "[a]n order dismissing the entire action followed" which was subsequently summarily affirmed by the Court of Appeals. (Pet. at 5.) Petitioners then append the Order from July 1985 (Pet. at A22), but conspicuously omit the accompanying Memorandum Opinion which it references.

For completeness and ease of reference, respondent has included in the Appendix to this Brief in Opposition ("Opp.") the dismissal by the Court of Appeals of petitioners' first appeal to that court (Opp. at A1-2), the District Court's July 1985 final order of dismissal and accompanying Memorandum Opinion (Opp. at A3-12), and the Court of Appeals' summary affirmance of that order (Opp. at A13).

[2] II *Martindale-Hubbell Law Directory* 705B, 706B (1985).

any event, and no purpose would be served by now reviewing those decisions even if they were before the Court.[3]

STATEMENT OF THE CASE

Petitioners' statement of the case is incomplete and substantially irrelevant to the order at issue. Respondent Standard Oil Company (Indiana) [hereinafter "Standard"] [4] thus presents the following restatement of facts.

A. The District Court's 1984 Interlocutory Orders.

This action originally was brought pursuant to a 1979 Stock Purchase Agreement ("Agreement") under which the petitioners claim they are third-party beneficiaries. Petitioners' claims arise in substantial part, if not entirely, under a Section in the Agreement which expressly requires that "[a]ny dispute" arising under it "shall be subject to arbitration . . . ." (Pet. at A5.) Nonetheless, in April 1983 petitioners filed their multi-count complaint in the United States District Court for the District of Columbia.

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[3] Simultaneous with filing this Opposition, respondent is filing a motion and memorandum pursuant to Supreme Court Rule 49.2 and 28 U.S.C. §§ 1912, 1927 (1982) seeking double costs and attorney's fees from petitioners for filing their misleading and frivolous petition for writ of certiorari.

[4] Standard amended its Articles of Incorporation in 1985 to change its name to Amoco Corporation. For ease of reference and continuity with other pleadings in this matter, however, respondent will be referred to herein as Standard. The following companies are all those in which Amoco Corporation has a direct or indirect ownership interest and which have outstanding securities in the hands of the public: Amoco Company, Analog Devices, Inc., Automating Peripherals, Ltd., Black Feet Indian Writing Co., Cetus Corporation, F M 4 Gila River Corporation, Gigabit Logic, Inc., Highland Community Bank, High Life Helicopter, Inc., Packet Technologies, Inc., Superphone Corporation, TAC Systems, and Tenco Hydro, Inc.

Standard thereafter moved for summary judgment and/or dismissal on the grounds that the claims must be submitted to arbitration and, alternatively, that each count should be dismissed on its merits. Pursuant to Fed. R. Civ. P. 26(c), Standard requested and obtained a protective order staying discovery while that motion was pending (Pet. at A23-24) on the grounds that discovery would be unnecessary if the District Court ruled in favor of Standard on its dispositive motion.

In July 1984, the District Court, per Judge Thomas Hogan, granted Standard's motion for summary judgment on two of petitioners' claims and stayed consideration of a third claim pending arbitration to interpret the Agreement. Judge Hogan determined, first, that it "would be inequitable" for petitioners "to reap the benefits of the contract as third party beneficiaries without being bound by the arbitration clause" contained in the same Agreement. (Pet. at A9.) The Court found, second, that two counts of the Complaint should be dismissed on the merits, one because it conflicted with the "clear and unambiguous" language of the Agreement and another (an alleged oral promise to purchase securities) because it was barred by the Statute of Frauds. (Pet. at A10-12.)

The District Court thus ordered a stay of further litigation as to the third count and an additional proposed count based on fraud, pending arbitration to obtain an interpretation of the Agreement which would determine if those counts were viable. (Pet. at A17-19.)

B. The District Court's July 1985 Final Order Of Dismissal For Petitioners' Subsequent Failure To Prosecute And "Blatant Disregard Of Court Orders And Rules".

The conduct by petitioners that led to dismissal of their case began shortly after issuance of the July 1984 interlocutory order. Petitioners' appeal of that ruling—sub-

sequently described by Judge Hogan as "frivolous" (Opp. at A8)—was quickly dismissed on the grounds that the July 1984 order was neither a final order nor an appealable interlocutory order. *Ames* v. *Standard Oil Co. (Indiana)*, C.A. 84-5596 (D.C. Cir. 1985) (issued Jan. 9, 1985), *reh'g denied*, Feb. 20, 1985. (Opp. at A13.)

As detailed in Judge Hogan's subsequent Memorandum Opinion, petitioners then began compiling a "record of dilatory prosecution" which made it apparent that they "were desperately scrambling to avoid the arbitration process." (Opp. at A8, A10.) Any one of several petitioners' actions provided ample ground for dismissal; taken together, they compelled it:

- For almost an entire year, petitioners refused to proceed to arbitration. (Opp. at A8.)
- Mr. Ames inexcusably failed to attend a court-ordered status conference. (Opp. at A4.)
- Mr. Ames failed to file a court-ordered status report, asserting he did not receive official notice that one was required, but then purposefully ignored the order after he received actual notice of it. (Opp. at A4, A8 n.5.)
- Mr. Ames violated a third court order by attempting to again amend petitioners' complaint prior to arbitration. (Opp. at A5.)
- Mr. Ames failed to initiate arbitration after an express warning from the District Court that he had thirty days to do so or face dismissal for failure to prosecute. (Opp. at A9.)

Finding that no lesser sanction was appropriate and acting under the authority of Fed. R. Civ. P. 41(b), Local Rule 1-14 (now Rule 211) and the court's inherent power, Judge Hogan dismissed petitioners' entire action on July 28, 1985 for failure to prosecute and "blatant disregard of court orders and rules." (Opp. at A8 n.10, A6.) Ob-

serving at one point that Mr. Ames had skirted "the ethical obligations of the bar" by "blithely ignor[ing] the existence of outstanding Court orders" Judge Hogan concluded that Mr. Ames, "equipped with the knowledge and expertise of a practicing attorney, bears full responsibility for its own fate." (Opp. at A8-9 n.5, A10 n.7.) Judge Hogan's eleven page opinion, which was neither referenced by the petition nor attached to it, was subsequently reported at *Ames* v. *Standard Oil Co. (Indiana)*, 2 Fed. R. Serv. 3d 528 (D.D.C. 1985).

C. The Summary Affirmance By The Court Of Appeals Of The July 1985 Final Order.

Petitioners lodged a second appeal following the July 1985 final order. Standard moved for summary affirmance of the order, explaining that any continuing objections petitioners' might have to the prior 1984 interlocutory orders were, of course, now moot. As anticipated, petitioners argued in response that the year-old interlocutory orders were subject to review, yet cited no authority to support that proposition.[5] Standard reiterated in its Reply Memorandum that, under established law, a dismissal for failure to prosecute moots objection to prior interlocutory orders.

By *per curiam* order issued February 12, 1986, the Court of Appeals summarily affirmed Judge Hogan's dismissal. (Opp. at A13.) The court left no doubt that it was reviewing the dismissal for failure to prosecute and that it agreed with the District Court's analysis of that issue:

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[5] The only case petitioners cited in their legal argument did not pertain to dismissal for failure to prosecute and, in fact, granted a motion for summary affirmance. *See Opposition of Plaintiffs-Appellants to Motion for Summary Affirmance*, submitted December 6, 1985, at 9-10 (citing *U.S.* v. *Glover*, 731 F.2d 41 (D.C. Cir. 1984)).

> In reviewing a ruling of a trial court on a motion to dismiss under Federal Rule of Civil Procedure 41(b), this court must affirm the ruling unless the trial court has clearly abused its discretion. *Hobson* v. *Wilson*, 737 F.2d 1, 45 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1843 (1985) [affirming denial of motion to dismiss for failure to prosecute]. In the instant case . . . it is abundantly evident that the district court has correctly decided this matter . . . .

(Opp. at A13.)

The first sentence of their petition here acknowledges that petitioners seek review of the Court of Appeals order "entered in this proceeding on February 12, 1986 . . . ." (Pet. at 1.) Thus, and in light of the proceedings before the lower courts, petitioners assuredly are aware that it is the July 1985 order of dismissal for failure to prosecute which is at issue here. However, petitioners' argument neither discusses the July 1985 order nor explains on what legal theory the prior 1984 interlocutory orders would now properly be considered subject to review. In other words, petitioners' brief is wholly—and willfully—misleading and irrelevant.

REASONS FOR DENYING THE WRIT

The petition should be denied, first, because it directly violates Supreme Court Rules by failing to reveal, much less address, the grounds for dismissal below. Second, review of the factual determinations by the two lower courts is unwarranted in any event, especially given the broad discretion which is accorded to trial courts under Fed. R. Civ. P. 41(b). Third, the 1984 interlocutory orders which petitioners disingenuously ask this Court to review are now moot and are not properly subject to such examination. Fourth, these 1984 orders were appropriate in any case, since they did not deprive petitioners of any constitutional or statutory right and instead merely enforced the contractual agreement underlying this action.

ARGUMENT

I. PETITIONERS' WILLFUL FAILURE TO COMPLY WITH THE RULES OF THIS COURT OR TO ACCURATELY AND CLEARLY EXPLAIN THE ORDER AT ISSUE IS SUFFICIENT REASON TO DENY THIS PETITION.

The rules of this Court expressly provide that a petition for writ of certiorari must make "reference to the official and unofficial reports of any opinions delivered in the courts . . . below" (Rule 21.1(d)); must include a copy of the opinion "by the court whose decision is sought to be reviewed" (Rule 21.1(k)(i)); and must include a copy of "any other such opinions . . . rendered by the courts . . . in the case . . . ." (Rule 21.1(k)(ii)). The goal of these directives is amplified by Supreme Court Rule 21.5, which provides that "[t]he failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

Even during eras when the press of business was much less than it is today, the Court on occasion has denied petitions for failure to comply with this Rule. Providing its own emphasis, the Court explained in dismissing one petition:

> We . . . necessarily rely in an especial way upon petitions, replies, and supporting briefs. Unless these are carefully prepared, contain *appropriate* references to the record, and present with *studied accuracy, brevity, and clearness* whatever is essential to ready and adequate understanding of points requiring our attention, the rights of interested parties may be prejudiced and the court will be impeded in its efforts properly to dispose of the causes which constantly crowd its docket.

Furness, Withy & Co. v. *Yang-Tsze Insurance Association*, 242 U.S. 430, 434 (1917).[6] More recently, the Chief Justice has reminded that "[t]his Court must rely on counsel to present issues fully and fairly . . . ." *Fusari* v. *Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J. concurring).[7]

Petitioners directly violated several rules of the Court by willfully omitting Judge Hogan's reported July 1985 Memorandum Opinion from their petition and declining to inform the Court that failure to prosecute was the reason for the District Court's order of dismissal. The extent to which this action has impeded an accurate and complete understanding of the facts at issue speaks for itself; indeed, Standard believes it typifies petitioners' conduct in this case and independently justifies an award of double costs and attorney's fees. At minimum, such deception merits denial of the petition.

II. THE JULY 1985 FINAL ORDER OF DISMISSAL ENTERED BY THE DISTRICT COURT AND SUMMARILY AFFIRMED BY THE COURT OF APPEALS DOES NOT RAISE ANY ISSUE APPROPRIATE FOR REVIEW.

Petitioners at most are entitled to seek review of the merits of Judge Hogan's July 1985 final order and the summary affirmance of it by the Court of Appeals. How-

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[6] *See also Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924) ("We have pointed out the necessity for clear, definite, and complete disclosures concerning the controversy when applying for certiorari."); *Kennemer* v. *Billington*, 323 U.S. 709 (1944); *Humble Oil & Refining Co.* v. *Campbell*, 292 U.S. 648 (1934); *Tiger* v. *Lozier*, 275 U.S. 496 (1927).

[7] Cf. *Board of License Commissioners* v. *Pastore*, 469 U.S. 238, 105 S. Ct. 685, 686 (1985) (quoting the further admonition from the Chief Justice's concurrence in *Fusari* that "[i]t is appropriate to remind counsel that they have 'a continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation").

ever, it is a settled principle that this Court will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Manufacturing Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949). Petitioners have not endeavored to supply a reason, nor could they, as to why the Court should depart from this rule here.

A trial court has broad discretion, pursuant to both Fed. R. Civ. P. 41(b) and its inherent authority, to dismiss a cause for failure to prosecute or to abide by court orders. *See Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 633 (1962); *Thomas* v. *Arn*, —— U.S. ——, 106 S.Ct. 466, 471 (1985). Moreover, this Court understands that such discretionary power must be more than an illusion to be effective:

> [H]ere, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

National Hockey League v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976).

The decisions of the District Court and the Court of Appeals, far from warranting review, are entitled to particular deference here. As with the lower court in *National Hockey League*, Judge Hogan's "comprehensive memorandum" opinion shows that he "consider[ed] the full record in determining whether to dismiss," and the full record further demonstrates that he "was extremely patient" in his efforts to induce petitioners to go forward. *Id.* at 642. And the Court of Appeals for the District of Columbia Circuit does not lightly affirm dismissals for failure to prosecute. *See Trakas* v. *Quality Brands, Inc.*, 759 F.2d 185, 186 (D.C. Cir. 1985) (reversing dismissal

for failure to prosecute and noting that "use of the rule has been limited to egregious conduct by dilatory plaintiffs").[8] Yet, the appellate court ruled here that it is "abundantly evident" that this matter was "correctly decided . . . ." (Opp. at A13.) There is no reason for this Court to review Judge Hogan's reasoned, abundantly correct decision yet again.

III. PETITIONERS ARE NOT NOW ENTITLED TO SEEK REVIEW OF THE 1984 INTERLOCUTORY ORDERS.

The petition submitted here does not, of course, address the dismissal for failure to prosecute; it argues in its place that the 1984 stay of discovery first entered by the magistrate and left in place by Judge Hogan violated the Fourteenth Amendment of the United States Constitution. Immediately after Judge Hogan's July 1984 interlocutory order, continuing the stay of discovery pending arbitration, petitioners lodged an appeal of the July order without seeking or obtaining the certification required by Fed. R. Civ. P. 54(b) to appeal an order which is not final as to all counts of a complaint. This first appeal thus was dismissed when the Court of Appeals found that it "lack[ed] appellate jurisdiction" to review it. *Ames* v. *Standard Oil Co. (Indiana)*, C.A. No. 84-5596 (issued January 9, 1985). (Opp. at A1.)

Petitioners lost any right they had to review of the 1984 orders after the dismissal for failure to prosecute

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[8] Judge Scalia dissented from the Court of Appeals ruling in *Trakas* because, in his view, the majority's "decision intrudes upon the discretion that belongs to trial judges and that is essential for the fair and expeditious conduct of their business." 759 F.2d at 188. In order for trial courts to satisfy the end espoused in the majority opinion of "manag[ing] their calendars so as to dispense justice as expeditiously and efficiently as possible," Judge Scalia concluded that "the district judge's 'power to dismiss . . . must be more than theoretical.'" 759 F.2d at 191 (quoting *Automated Datatron, Inc.* v. *Woodcock*, 659 F.2d 1168, 1170 (D.C. Cir. 1981)).

in July 1985. "The substantive merits of a claim are of course irrelevant to the propriety of a dismissal for failure to prosecute . . . ." *Mathes* v. *Commissioner*, C.A. No. 84-5456 (D.C. Cir. 1986) (issued Apr. 18, 1986) (Scalia, J.) (sl. op. at 5). If it were the rule that review of interlocutory orders was proper following dismissal for failure to prosecute, it would encourage the type of conduct petitioners have employed here: flaunting court orders in order to receive the *sanction* of dismissal, and then using that "sanction" as a *de facto* Rule 54(b) "certification" to obtain review of prior interlocutory rulings. The law is properly settled that the courts cannot be manipulated in this manner:

> It would be unwise to encourage all would-be appellants from interlocutory orders to delay for the purpose of dismissal for lack of prosecution and review of otherwise unreviewable decisions. . . . [F]ailure to prosecute is not to be employed as an avenue for reaching issues which are not subject to interlocutory appeal as of right.

Ash v. *Cvetkov*, 739 F.2d 493, 497 (9th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S. Ct. 1368 (1985).[9]

Petitioners' ploy, contrary to established law, thus presents no argument worthy of review. As Judge Scalia noted in *Mathes*, upon dismissal for failure to prosecute

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[9] *See also Huey* v. *Teledyne, Inc.*, 608 F.2d 1234, 1239 (9th Cir. 1979), *cert. denied*, 458 U.S. 1106 (1982) (" 'If a litigant could refuse to proceed whenever a trial judge ruled against him, wait for the court to enter a dismissal for failure to prosecute, and then obtain review of the judge's interlocutory decision, the policy against piecemeal litigation and review would be severely weakened' "), quoting *Sullivan* v. *Pacific Indemnity Co.*, 566 F.2d 444, 445-46 (3d Cir. 1977); *Marshall* v. *Sielaff*, 492 F.2d 917, 919 (3d Cir. 1974) ("To review the district court's [interlocutory order] under the facts of this case is to invite the inundation of appellate dockets with requests for review of interlocutory orders and to undermine the ability of trial judges to achieve the orderly and expeditious disposition of cases").

only *that* order is subject to review because the underlying merits of a cause—including orders related to the merits—are irrelevant; the *conduct* of the party, not the merits of his complaint, is what is then subject to scrutiny. Here, the July 1985 dismissal for failure to prosecute superceded the prior 1984 interlocutory orders pertaining to the merits and these earlier orders thus are not properly subject to review. For the Court to now examine the wisdom of the 1984 rulings would encourage the "blatant disregard of court orders and rules" with which Judge Hogan patiently contended for almost a year.

IV. IN ANY EVENT, THE INTERLOCUTORY ORDERS STAYING DISCOVERY IN 1984 WERE REASONABLE EXERCISES OF DISCRETION WHICH WOULD NOT MERIT REVIEW EVEN IF THEY WERE PROPERLY BEFORE THE COURT.

Standard believes petitioners can advance no argument which even colorably would require the Court to consider review of the 1984 discovery orders. However, even on the issue they deceptively and wrongly assert is before the Court, petitioners have not presented an issue remotely worthy of review. Petitioners' request for review thus would be frivolous even if the issue they press were properly subject to consideration.

Initially, even petitioners' own scant authority—three cases, none of which are directly relevant—recognizes that discovery is subject to necessary limitations. *See Hickman* v. *Taylor*, 329 U.S. 495, 507 (1947) ("discovery, like all matters of procedure, has ultimate and necessary boundaries").[10] Accordingly, a District Court's

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[10] Indeed, the Court in each case cited by petitioners held that a *limitation* on discovery was there appropriate. *See Hickman* v. *Taylor*, 329 U.S. 495 (1947) (recognizing limitation of discovery related to attorney work product); *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964) (reversing lower court order that plaintiff must

rulings pertaining to discovery are subject to reversal only if the court acts "arbitrarily or fancifully . . . ." *Westmoreland* v. *CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985). *See also Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 104 S. Ct. 2199, 2209 (1984) ("The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders").

A stay of discovery pending a ruling on a potentially dispositive motion, far from being arbitrary or fanciful, is consistent with "'[t]he principle of judicial parsimony'" recognized in *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U.S. 689, 694 (1933) (citation omitted).[11] Thus, courts have properly entered protective orders, as was done here, on the ground that the complaint at issue might be subject to arbitration.[12]

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undergo a physical examination); *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968) (affirming limitation on discovery despite plaintiff's claim that this discovery was needed to respond to a pending motion for summary judgment). In commenting on two of these three decisions, this Court has further observed, with emphasis, that "judges should not hesitate to exercise appropriate control over the discovery process" if necessary "to secure the just, *speedy*, and *inexpensive* determination of every action." *Herbert* v. *Lando*, 441 U.S. 153, 177 (1979) (quoting Fed. R. Civ. P. 1).

[11] *See also* C. Wright, *Federal Courts* § 83 (1983) at p. 562-63, ("where one issue may be determinative of a case, the court has discretion to stay discovery on other issues until the critical issue has been decided"). Courts time and again have entered protective orders staying discovery where, for example, the court "is convinced that the plaintiff will be unable to state a claim for relief." *Wood* v. *McEwen*, 644 F.2d 797, 801 (9th Cir. 1981), *cert. denied*, 455 U.S. 942 (1982) (affirming stay). *Accord, B.R.S. Land Investors* v. *United States*, 596 F.2d 353, 356 (9th Cir. 1979); *Brennan* v. *Local Union No. 639, International Brotherhood of Teamsters*, 494 F.2d 1092, 1100 (D.C. Cir. 1974); *O'Brien* v. *Avco Corp.*, 309 F. Supp. 703, 705 (S.D.N.Y. 1969).

[12] *See, e.g., Lummus Co.* v. *Commonwealth Oil Refining Co.*, 273 F.2d 613, 614 (1st Cir. 1959) (refusing to order discovery pending

Similarly, it is also beyond doubt that a court may properly stay discovery pending a ruling, as also was issued here, that a contract claim conflicts with the plain and unambiguous language of the contract in dispute.[13]

In sum, the law is completely settled against petitioners even on the issue they erroneously press before the Court. The only authorities petitioners cite hold that the right to discovery is tempered by other concerns; one such concern is to avoid discovery if a dispositive motion may render it needless. Far from "arbitrary or fanciful," the 1984 orders staying discovery here clearly were proper and it is frivolous for petitioners to even ask for additional review.

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ruling on whether arbitration is required because "[u]ntil it is determined whether this action has been properly brought, appellee should not receive any unnecessary fruits thereof"); *Thompson* v. *Zavin*, 607 F. Supp. 780 (C.D. Cal. 1984); *Corcoran* v. *Shearson American Express, Inc.*, 596 F. Supp. 1113 (N.D. Ga. 1984); *Recognition Equipment, Inc.* v. *NCR Corp.*, 532 F. Supp. 271 (N.D. Tex. 1981); *Mississippi Power Co.* v. *Peabody Coal Co.*, 69 F.R.D. 558 (S.D. Miss. 1976).

[13] Dismissal or summary judgment is appropriate where unambiguous contract language shows a plaintiff is not entitled to relief. *See Jacksonville Newspaper Printing Pressmen and Assistants' Union No. 57* v. *Florida Publishing Co.*, 340 F. Supp. 993, 995 (M.D. Fla.), *aff'd*, 468 F.2d 824 (5th Cir. 1972), *cert. denied*, 411 U.S. 906 (1973). The parol evidence rule bars extrinsic evidence at variance with unambiguous language, and therefore discovery would be useless to "interpret" this clear language. *See Sullivan* v. *Massachusetts Mutual Life Insurance Co.*, 611 F.2d 261, 264 (9th Cir. 1979) (affirming summary judgment based on written contract because proof of alleged oral agreement to the contrary was barred by the parol evidence rule). *See also* 10A, C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure: Civil 2d* § 2730.1 (1983) ("when the contract is unambiguous on its face the operation of the parol evidence rule will preclude the introduction of outside evidence to dispute its terms and summary judgment is particularly appropriate").

CONCLUSION

In 1983, Petitioners filed their complaint in the wrong forum by proceeding in court instead of through arbitration. In 1984, when the District Court dismissed some of their claims and stayed others pending arbitration, petitioners filed an appeal at the wrong time because the court's order was not final. In 1985, their entire action was dismissed for failure to prosecute and summarily affirmed thereafter. Now, in 1986, petitioners seek a writ of certiorari asking for review of the wrong order. Petitioners' disingenuous petition should be denied on that basis alone. Moreover, petitioners' complete failure to address the dismissal for failure to prosecute only underscores the frivolous nature of their petition. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: August 1, 1986

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1984

No. 84-5596

WALTER D. AMES and MARION L. AMES,
Appellants

v.

STANDARD OIL COMPANY (INDIANA)

C.A. No. 83-01183

[Filed Jan. 9, 1985]

Before: Wright, Mikva, and Edwards, Circuit Judges.

ORDER

Upon consideration of Appellee's Motion to Dismiss Plaintiffs' Appeal and Award of Double Costs and Attorney's Fees, and the Opposition and Reply thereto, it is

ORDERED by the court that appellee's motion to dismiss is granted. Because the district court's order in *Ames v. Standard Oil Co.*, C.A. No. 83-1183 (July 26, 1984) does not constitute a final order under 28 U.S.C. § 1291 or an appealable interlocutory order under 28 U.S.C. § 1292(a)(1), this court lacks appellate jurisdiction. *See Carson v. American Brands, Inc.*, 450 U.S. 79 (1981); *Hussain v. Bache & Co., Inc.*, 562 F.2d 1287 (D.C. Cir. 1977). It is

FURTHER ORDERED by the court that appellee's motion for award of double costs and attorney's fees is denied. *See* Fed. R. App. P. 38. It is

FURTHER ORDERED by the court, on its own motion, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any petition for rehearing. *See* Local Rule 14.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-1183

WALTER D. AMES, *et al.*,
Plaintiffs

v.

STANDARD OIL COMPANY (INDIANA),
Defendant

[Filed July 28, 1985]

MEMORANDUM OPINION

Plaintiffs in the present action have asserted several claims arising out of an alleged breach by defendant Standard Oil Company (Standard) of a stock purchase agreement dated May 25, 1979. In a summary judgment opinion dated July 25, 1984, summary judgment was granted for defendant on contract and tortious interference with contract claims; other claims, alleging RICO violations and fraud, were "stayed until such time as arbitration is completed." The Court's decision was based in large part on the failure of plaintiff to comply with an arbitration clause in the stock purchase agreement.

On August 27, 1984, plaintiffs appealed from the Court's interlocutory order of May 25th. On January 9, 1985, the Court of Appeals of this Circuit granted appellees' motion to dismiss on the grounds that the May 25th order was not a final order on an appealable interlocutory order under 28 U.S.C. § 1292(a)(1).[1]

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[1] Plaintiffs filed a petition for rehearing that was denied on February 20, 1985.

Upon learning of the dismissal of plaintiffs' appeal, the Court sent out notice of a status call to be held on February 13, 1985. Counsel for plaintiffs, Walter Ames, who practices law in Washington, D.C., failed to attend that status call or to inform the Court of his inability to attend. Counsel for defendant, who flew in from Chicago to attend the status conference, was also not informed that plaintiff would be absent. Because of plaintiffs' absence, the status call had to be terminated.

In another attempt to ascertain if plaintiffs were interested in pursuing this litigation, the Court issued an order on April 4, 1985. That order requested that the parties "file a status report informing the Court of their progress in arbitration of the underlying contract claim. If the parties have not proceeded to arbitration, the Court requests that they set forth in detail their intentions with respect to continuing the litigation of this case."

On April 18th, the Court received defendant's status report, but plaintiffs did not respond to the Court's order.[2] Instead, on May 3, plaintiffs moved to amend their complaint, an action that was both meaningless in view of the self-imposed limbo in which plaintiffs' con-

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[2] Plaintiffs later argue that failure to comply with these orders is excusable because plaintiff Ames—acting as counsel for himself and his wife—failed to receive the Court's orders. Plaintiffs "surmise" that this is so because plaintiff's law firm moved its offices approximately a year ago. Given the fact that plaintiff is a member of this bar, he must be aware that Local Rule 1-5(b) requires notice of change of address to be filed by praecipe within 10 days. Otherwise, the address provided on the initial pleading "shall be conclusively taken as the last known address . . . of said party or attorney." Because plaintiff did not file a change of address notice with this Court, the pleadings in question were mailed to his "last known address." Plaintiffs' failure to receive Court Orders is not "unavoidable" or "excusable" but a direct result of his failure to follow Local Rules. It is also additional evidence of plaintiffs' general disregard of this litigation.

duct put the case and contrary to the Court's Order of July 26, 1984. According to that Order, the case was "stayed until such time as arbitration is completed and plaintiffs may then file, if appropriate, a third amended complaint.[3]

On May 17, Standard Oil moved to dismiss on grounds that plaintiff had repeatedly violated court orders and failed to prosecute the case. Standard's Memorandum in Support of Dismissal was joined with a motion in opposition to plaintiffs' move to amend. After receiving a ten-day extension of time, plaintiffs filed a reply to Standard's motion and opposition.

Based on the pleadings before it, the Court would have been justified in dismissing this suit at that time. Plaintiffs' opposition provided no valid justification for his failure to appear and to respond to Court orders. *See supra* fn. 2. More importantly, plaintiffs proffered no suggestion that arbitration was underway or was going to be initiated in the near future. Instead, plaintiffs offered the cryptic "admission" that "they [plaintiffs] obviously prefer litigation to arbitration. If they have to go to arbitration they will." Plaintiffs' Opposition to Motion to Dismiss at 6. Obviously, one would have expected plaintiffs to concede that the question of whether they "have to go to arbitration" was no longer open. Their suggestion that this issue was debatable and their gratuitous observation that the Court of Appeals' dismissal of their appeal was incorrect suggested to the Court that plaintiffs had little interest in pursuing the only course available to them.

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[3] According to plaintiffs, the Order does not say that the plaintiffs may "*only* then file," and so its instruction on the filing of amendments is merely permissive and not restrictive. While plaintiffs are correct as a matter of semantics, in the context of the litigation and in light of the rest of the opinion, the interpretation offered by plaintiff is, at best, a somewhat frivolous excuse for ignoring Court Orders.

However, because dismissal is a strict sanction, the Court offered plaintiffs a final opportunity to demonstrate their intent to prosecute this case. On June 11, 1985 the Court denied both the motion to dismiss and the motion to amend, without prejudice. The Court also ordered that:

> Plaintiffs shall have thirty days from the date of this Order to file a status report with the Court, detailing the steps that plaintiffs have taken to comply with the year-old Court order requiring plaintiffs to submit their claims to arbitration. If, in thirty days, the Court receives no report or learns that arbitration is not yet underway, defendant's motion to dismiss because of failure to prosecute and disobedience to Court orders will receive reconsideration.

Thirty days later, plaintiffs filed their report. Surprisingly, plaintiffs admitted that an arbitration demand had not yet been filed, although plaintiffs did suggest that they had managed to obtain a copy of the arbitration rules and were "studying the rules for initiating arbitration."[4] In short, the plaintiffs' pleading was nonresponsive and completely unsatisfactory.

According to the terms of the Court's order of June 12, 1985, the Court will now turn to a reconsideration of defendant's motion to dismiss.

Standard, in its May 17th motion, argues that this case should be dismissed because of plaintiffs' failure to prosecute this action, *see* Fed.R.Civ.P. 41(b); Local Rule 1-14, and because of plaintiffs' blatant disregard of court orders and rules. The Court now agrees with defendant's position.

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[4] Arbitration rules are, of course, designed for lay persons; thus, the Court has serious reservations about the amount of "study" required to file a "fill-in-the-blanks" arbitration demand.

The federal courts possess undisputed authority to control their dockets and to dismiss those cases that plaintiffs fail to prosecute. *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 629 (1962). Such a dismissal is proper if, in view of the history of the litigation, the litigant has failed to exercise reasonable diligence in pursuing the case. *See, e.g., Cherry v. Brown-Frazier-Whitney*, 548 F.2d 965, 969 (D.C. Cir. 1976). Of course, the question of whether an action is being pursued with "reasonable diligence"—as opposed to "protracted delay"—is a highly factual inquiry, to be determined upon a consideration of all pertinent circumstances. *See Link*, 370 U.S. at 634-35. However, the district courts are not entirely without guidance in exercising this discretion.

It is clear, for example, that a "single act of misconduct" does not usually justify a dismissal. *Trakas v. Quality Brands*, 84-5229, slip op. at 6 (D.C. Cir., April 16, 1985); *Camps v. C & P Telephone Co.*, 692 F.2d 120, 123 (D.C. Cir. 1981); *Jackson* v. *Washington Monthly Co.*, 569 F.2d 119 (D.C. Cir. 1977). In addition, dismissal is generally not warranted where the conduct in question is "inadvertent" or "excusable." *See Societe Internationale v. Rogers*, 357 U.S. 197, 212 (1958).

On the other hand, a dismissal is clearly an appropriate sanction where, as here, a litigant has engaged in a "course of protracted neglect." *Jackson v. Washington Monthly Co.*, 569 F.2d 119, 121 (D.C. Cir. 1977). Such neglect includes not only failure to pursue the litigation in the district court but also any failure to prosecute in an "alternative forum" such as an agency or arbitration proceeding. *See Allied Air Freight, Inc. v. Pan American World Airways, Inc.*, 393 F.2d 441, 445 (2d Cir.), *cert. denied*, 393 U.S. 846 (1968). Dismissal for failure to prosecute is particularly appropriate when such a failure is coupled with disobedience to court orders or a disregard of established rules. *See Shaeffer v. Warehouse*

Employees Union Local No. 730, 408 F.2d 204, 205 (D.C. Cir.), *cert. denied*, 395 U.S. 934 (1969).

Although prejudice to opposing counsel is not a condition of dismissal, *Cherry*, 548 F.2d at 970 n.49, the prejudice to the opposing party—in terms of time and expense—may be considered. In fact, recent decisions suggest that prejudice may be presumed where plaintiff fails to diligently prosecute an action. *See, e.g., Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37 (2d Cir. 1982).

The Court also takes note of the larger concerns of "just, speedy and inexpensive" determination of civil cases, Fed.R.Civ.P. 1, that are frustrated when the Court is required to spend inordinate amounts of time dealing with recalcitrant litigants. Experience teaches that one irresponsible party's repeated delays can cause a ripple effect of delay and postponement in the Court's entire calender. Thus, if the district courts are to avoid exacerbating the already heavy backlog of litigation, the power and willingness to draw the line on dilatory litigants "must be more than theoretical." *Automated Datatron, Inc. v. Woodcock*, 659 F.2d 1168, 1170 (D.C. Cir. 1981). *See also National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. (1976) (suggesting need for credibility in enforcement if discovery sanctions are to have required deterrent effect).

In the present case, plaintiffs' record of dilatory prosecution speaks for itself. As the record shows, almost a year has passed since plaintiffs were first ordered to proceed to arbitration. Over six months have passed since the Court of Appeals dismissed plaintiffs' frivolous appeal of that order. In those six months, plaintiffs have ignored or otherwise failed to comply with three Court orders.[5]

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[5] As noted, *supra*, fn. 4, plaintiffs offer an "excuse" for noncompliance that does not justify their ignorance of Court orders. Both local rules and the ethical obligations of the bar require considerably more of counsel than to sit back and hope the Court is

Perhaps the most telling indication of plaintiffs' unwillingness to prosecute this case in accordance with Court Orders was their response to the Order of June 12th, which provided that if "arbitration is not yet underway," in thirty days, the motion to dismiss would be reconsidered. Even this unveiled warning of imminent dismissal [6] failed to rouse plaintiffs from their "slumber," *cf. Cherry*, 548 F.2d at 969. To the surprise of the Court, plaintiffs did not initiate the long-overdue arbitration process in the thirty-day deadline. Instead, plaintiffs nonchalantly suggested that they had just managed to obtain the proper forms and would "momentarily" complete and serve them.

For the most part though, plaintiffs' status report—like their opposition to the motion to dismiss—focuses not on their own challenged conduct. Instead, plaintiffs' briefs on this issue repeatedly question the costs and necessity of arbitration, the legality and accuracy of this Court's (and this Circuit's) opinions, and, in general, treat the issue of arbitration, which has long been settled, as a proper subject for argument. Given this implied belief in their right to "deal with the Court on [their] own terms, as and when [they] pleased," the Court has no reason to believe that plaintiffs have any intention of complying—promptly or otherwise—with the orders of

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able to find him when orders are issued. *See* Reply Memorandum in Support of Standard Motion to Dismiss. At the very least, plaintiffs became aware of this Court's continuing efforts to prod them to action when they received Standard's Status Report of April 18 "in response to the Court's Order of April 4, 1985." Rather than contact the Court or check the case files in the clerk's office to determine what they had missed, plaintiffs blithely ignored the existence of outstanding Court orders.

[6] *See Camps*, 692 F.2d at 125 (suggesting that "advance warning" which "pinpoint[s]" possibility of dismissal and details steps necessary to avoid dismissal is recommended prerequisite to dismissal of *pro se* litigant).

this Court. *See Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 949 (9th Cir. 1976).

Plaintiffs' delay in this action is longstanding; their refusal to follow the rules and orders of this Court is well documented. They have offered no viable reason[7] for allowing this litigation to proceed. In fact, as previously noted, it may have been appropriate to dismiss this action at an earlier time. In any event, the time has now come when dismissal is appropriate and necessary.[8]

The Court does not mean by this opinion to impugn the integrity of plaintiffs, nor does it mean to suggest any comment on the merits of plaintiffs' claims, but it is obvious that plaintiffs were desperately scrambling to avoid the arbitration process. One can gather that plaintiffs did not cherish the expense of arbitration and one

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[7] Indeed, plaintiff Walter Ames' status as counsel renders plaintiffs ill-equipped to plead leniency on one of the leading grounds for avoiding dismissal, the judicial aversion to "visit[ing] the sins of the lawyer upon the client. . . ." *See Woodcock*, 596 F.2d at 121. Where, as here, a member of the bar is appearing *pro se* (for himself and his spouse), any such propensity to lenience may be tempered by the knowledge that plaintiff, equipped with the knowledge and expertise of a practicing attorney, bears full responsibility for his own fate. In addition, the Court warned Mr. Ames, at an early stage in this litigation, of the self-evident dangers of self-representation. Given the decision to disregard this warning, and plaintiff's legal training and experience, no more need be said on this issue.

[8] The Court has considered alternative sanctions but is of the opinion that there is no less drastic alternative that would be appropriate. *See Trakas*, slip op. at 5-6 (Scalia, J., dissenting). This is not a case where there was a single disobedience of court orders or a single failure to appear, which could be partially remedied by ordering attorneys' fees for opposing counsel. Nor is this a situation, as is the case in discovery disputes, where issues may be precluded or claims stricken as an appropriate sanction. Where, as here, a party, over a period of many months and in defiance of the Court, refuses to prosecute an action, an order of dismissal is the only appropriate sanction.

might also surmise that they did not believe their claims would fare well in that forum. Nevertheless, the Court had entered the order, the appeal had been dismissed, and warnings to proceed had been ignored by the plaintiff. *Cf. Bomate v. Ford Motor Company*, 83-2303, slip op. (D.C. Cir., April 2, 1985). If in light of this record, plaintiffs still hoped they could somehow delay and thereby avoid arbitration, one cannot help but read in this record an assurance that hope springs eternal. Litigation, however, should enjoy a significantly shorter lifespan.

Defendant's Motion to Dismiss will be granted; an appropriate Order will issue in accordance with the terms of this opinion.

/s/ Thomas F. Hogan
THOMAS F. HOGAN
United States District Judge

Dated: July 26th, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-1183

WALTER D. AMES, *et al.*,
Plaintiffs

v.

STANDARD OIL COMPANY (INDIANA),
Defendant

[Filed July 28, 1985]

ORDER

Upon consideration of the defendant's Motion to Dismiss, the plaintiffs' opposition thereto, the entire record, and in accordance with the memorandum opinion issued this day, it is this 26th day of July, 1985, hereby

ORDERED that the above captioned case shall be and is dismissed.

/s/ Thomas F. Hogan
THOMAS F. HOGAN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1984

No. 84-5597

WALTER D. AMES, *et al.*,
Appellants,

v.

STANDARD OIL COMPANY (INDIANA)

C.A. No. 83-01183

[Filed Feb. 12, 1986]

Before: ROBINSON, *Chief Judge*, WALD and GINSBURG, *Circuit Judges*

ORDER

Upon consideration of appellee's motion for summary affirmance, the opposition, and the reply thereto, it is

ORDERED by the court that the motion for summary affirmance is granted. In reviewing a ruling of a trial court on a motion to dismiss under Federal Rule of Civil Procedure 41(b), this court must affirm the ruling unless the trial court has clearly abused its discretion. *Hobson v. Wilson*, 737 F.2d 1, 45 (D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 1843 (1985). In the instant case the trial court did not abuse its discretion. Since it is abundantly evident that the district court has correctly decided this matter, further briefing and oral argument would not affect this court's decision. *See Sills v. Bureau of Prisons*, 761 F.2d 792, 794 (D.C. Cir. 1985).

The clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14.

Per Curiam